No. 14692

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT,

v.

NATIONAL WHOLESALERS, A CORPORATION; M-D PARTS MANUFACTURING COMPANY; NATIONAL PARTS COMPANY; AND HENRY MEZORI, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This action was instituted under the False Claims Act, Rev. Stat. 3490-3492, 5438, 31 U. S. C. 231-233, *infra,* pp. 37-39, to recover amounts alleged to be owing the United States by reason of appellees' submission of claims to the Government for payment with the knowledge that they were false, fictitious or fraudulent (R. 3-10). The jurisdiction of the District Court over the action rested upon 31 U. S. C. 232. On December 16, 1954 the United States District Court for the Southern District of California, Central Division,

entered judgment dismissing the complaint (R. 54). On February 9, 1955 the United States filed notice of appeal (R. 54). The jurisdiction of this Court rests upon 28 U. S. C. 1291.

STATEMENT OF THE CASE

On February 15, 1950 the Detroit Ordnance District of the Department of the Army extended a written invitation to 56 business concerns to submit bids for the furnishing of 6,600 generator regulators, "Mfr's Part Nos. DR-1118502, GM-1118502, IHC-50301-R1, or equal" (SR. 295).[1] The invitation stipulated [Special Condition 2e] that a bidder failing to indicate that he proposed to furnish a substitute "or equal" item would, if awarded the contract, be required to furnish the article specifically referred to, "without substitution of any kind" (S.R. 292). It further stipulated [Special Condition 2d] that any bidder offering in his bid to supply a substitute item as an "or equal" was to submit "*with the bid,* all necessary specifications, drawings, bills of material and other pertinent supporting data" to enable the Army to determine whether the proposed "equal" product would be acceptable for its intended use (SR. 292).

On April 1, 1950, appellee National Wholesalers (hereinafter referred to as "Wholesalers") entered a bid "in compliance with * * * the * * * invitation for bids, and subject to all conditions thereof" (SR. 286). This bid contained no indication that Wholesalers intended to furnish an "or equal" item for the generator regulator specified by part numbers in the

[1] The invitation extended to appellees appears in the supplemental printed record, designated as "SR".

invitation, which Wholesalers correctly understood to be a regulator manufactured by the Delco-Remy Division of the General Motors Corporation (R. 32). To the contrary, Wholesalers expressly represented in its bid that it was "Bidding DR-1118502"[2] and the bid was not accompanied by the specifications and drawings which, under the terms of the invitation, were to be supplied in circumstances where the bidder intended to supply an "or equal" item (SR. 295). Further, the bid stated that Wholesalers was a dealer, rather than a manufacturer, of regulators (SR. 294).

This bid was accepted by the Army on the day of its receipt (R. 31). Wholesalers, however, did not undertake to deliver No. DR-1118502 Delco-Remy regulators, as the bid indicated it intended to do. Instead, in conjunction with two affiliates, appellees M-D Parts Manufacturing Company and National Parts Company, Wholesalers undertook itself to manufacture and assemble regulators for delivery to the Government under the contract (R. 33). In the manufacturing and assembling process, some genuine Delco-Remy parts were employed; other parts, as will appear in more detail below, were acquired from and manufactured by sub-contractors of Wholesalers in the Los Angeles area who had no connection whatsoever with Delco-Remy (R. 33).

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[2] This representation was necessitated by Special Condition 2a of the invitation which provided that (SR. 292): "The bidder *must indicate* the part number which he proposes to furnish in the space provided alongside the items on which he is submitting a bid. Bids received which do not indicate clearly the part number which will be furnished and which, in the case of "or equals", are not accompanied by fully revealing specifications and drawings, may be deemed non-responsive by the Contracting Officer." [Emphasis appears in the original.]

After these regulators were assembled, appellees affixed to each a counterfeit nameplate which was identical in size, shape and color scheme with the genuine nameplate used by Delco-Remy itself on its own regulators and which bore this legend (R. 33, 183):

Delco-Remy

Generator Regulator

Model 1118502

6 Volt System 40 Ampere

Negative Ground
Made in U.S.A.

These counterfeits were obtained by appellees in the following manner. In May, 1950 one Lang, an employee of M-D Parts, appeared at the establishment of a manufacturer of nameplates named Nelson (R. 183). Using Nelson's purchase order blank, Lang placed an order for 7,000 Delco-Remy nameplates (R. 183, 185). Lang represented that he was associated with the "Thompson Distributing Company," a fictitious company, and signed the order form with the name of that company and his own name (R. 185). After he received and paid for the counterfeit nameplates, Lang insisted that Nelson return to him the order form he had executed (R. 187). Nelson complied with this request and it was only several months later that he discovered that Lang was in actuality an employee of M-D Parts and had placed the order on behalf of appellees (R. 185).

Between June 19, 1950 and September 14, 1950, Wholesalers delivered seventeen shipments of these regulators, manufactured by itself and bearing the

spurious Delco-Remy nameplates, to various Army arsenals (R. 33). These shipments, totaling 4,086 regulators, were each accompanied by an invoice which (1) described the item being furnished as a DR-1118502 regulator; (2) *made no reference to "or equal";* and (3) contained Wholesalers' certification that "[t]his bill is correct and just" and that "all conditions of purchase applicable to the transactions have been complied with."[3] Additionally, the invoices carried the certification of one Duffy, the resident Army ordnance inspector at Wholesaler's establishment, that he had accepted the articles as conforming to the contractual requirements (R. 103). Duffy, relying on the outward appearance of the regulators, had assumed that they were of Delco-Remy manufacture, as the certification in the invoice represented (R. 200). For this reason, after a visual inspection to make certain that, among other things, no corrosion had taken place he had accepted the regulators as being of Delco-Remy manufacture (R. 196-197).

On the basis of Wholesalers' certification, and the acceptance of the regulators by the resident ordnance inspector in the belief that they were genuine Delco-Remys, the amount claimed in each of the seventeen vouchers, totalling $96,021, was duly paid to Wholesalers.[4] On or about September 14, 1950, however, the Army discovered that the regulators that had been supplied were not of Delco-Remy manufacture but in-

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[3] One of these invoices is reproduced as an illustrative example at page 103 of the record. The other sixteen invoices, which also were introduced into evidence below as part of Government exhibit 1 (R. 100-101), are identical in material part.

[4] The Government checks representing payment of $23.50 for each of the 4086 regulators are included in Government exhibit 1. One of them appears in the supplemental printed record (SR. 296).

stead were "chinese copies" (R. 116). As a result, the resident inspector was instructed not to accept any more regulators and the Contracting Officer arranged for the Detroit Arsenal of the Ordnance Corps to determine whether the balance of Wholesalers' regulators would be acceptable on an "or equal" basis (R. 117).

On October 16, 1950 the Contracting Officer wrote to Wholesalers advising that its regulator qualified as an "or equal" and that delivery of the remaining regulators called for by the contract would be accepted on the basis (R. 116-118). The letter made no reference, however, to any decision by the Government to waive the misrepresentations contained in Wholesalers' certification respecting the 4,086 regulators already delivered. Instead, it specifically called Wholesalers' attention to the facts (1) that it had contracted to supply genuine Delco-Remy regulators; (2) that it failed to follow the procedure set forth in the invitation for qualifying "or equal" items; (3) that it had represented that it was not a manufacturer of regulators; and (4) that it had tendered for acceptance regulators bearing counterfeit Delco-Remy nameplates (R. 117).

On July 3, 1953, the Government filed its complaint under the False Claims Act, *infra,* pp. 37-39, alleging that the seventeen invoices submitted for payment prior to September 14, 1950 (the date that the Army suspended delivery) were false, fictitious or fraudulent and were known to be such by appellees (R. 3-10). In its prayer for relief, the Government demanded double damages plus the $2,000 prescribed by the Act for each false claim (R. 10). In its answer, appellees denied the allegations of fraud and relied by way of an affirmative defense upon the acceptance by the Army of the

balance of the regulators on an "or equal" basis (R. 12-17).

At the trial, the Government demonstrated, in addition to the facts summarized above, that the counterfeit regulators supplied by appellees differed in several material respects from the genuine Delco-Remy regulator which appellees had represented they were bidding on and had certified in their invoice that they were supplying. At the outset, the court below ruled that this evidence was incompetent, irrelevant and immaterial but permitted the Government to make a record of it in accordance with Rule 43(c) of the Federal Rules of Civil Procedure (R. 135, 147, 154, 159, 164, 175, 179, 188, 219). Subsequently, however, the District Court partially reversed its position and ruled that it would receive the evidence "on the issue of whether or not the claims presented were false or fraudulent" but not "as being relevant to any issue of whether or not the regulators [supplied] were inferior [to the genuine Delco-Remy]" (R. 249).

The evidence admitted by the court for this limited purpose showed that the armature assemblies used in appellees' regulators were manufactured and supplied by the Acme Electronics Company (R. 134, 140-143). Each of these armatures contained, as essential parts thereof, hinges made of either bronze or steel (R. 143). The DR-1118502 regulator at the time in question contained hinges made of bimetal, which, while similar to steel, possesses different electrical characteristics as well as a great flexibility under heat (R. 143-144, 223). Delco-Remy used bimetal hinges because bimetal insures constant voltage, an extremely important function of a voltage regulator (R. 227-229). The voltage of regulators with non-bimetal hinges, on the other hand,

will vary as much as 20%, depending upon climatic conditions and the temperature of the unit (R. 227).

Another material difference between the Delco-Remy regulator and appellees' regulator related to the upper and lower insulating plates. Appellees' plates were purchased locally from one LaMoree and were made of a paper-based phenolic substance (R. 158-163). Delco-Remy, however, employed a linen-based material both in its DR-1118502 regulator, which was designed specifically for heavy military duty, and its other regulators made for use in large vehicles (R. 230, 233). While the insulating properties of both linen-based and paper-based plates of the same thickness are equivalent, the former are considerably more durable and will take much greater abuse before cracking (R. 231). For this reason, Delco-Remy restricts the use of paper-based plates to regulators intended for use in light passenger vehicles, where durability is not a significant factor (R. 233).

Appellee Mezori, in his capacity as general manager of the three appellee companies, personally passed upon the subcontracts with Acme and LaMoree (R. 113). As a result, he knew that the hinges were not made from bimetal and that the insulation was paper-based (R. 167, 238, 239). Furthermore, Wholesalers' Sales Manager Kornbacher, who possessed similar knowledge, discussed the performance of the contract with Mezori in late April or early May of 1950 (R. 169). During the discussion, Mezori stated that he "would deliver to the Army regulators assembled by him made to appear like the Delco-Remy model" (R. 169). Kornbacher thereupon suggested that the Army be advised of this intention since "the original item we thought we were going to furnish the Army [is] not the item

they desired." (R. 170). According to Kornbacher, this suggestion was not "vetoed" by Mezori but it was "never acted upon, either" (R. 170).

On December 1, 1954 Judge Mathes entered an order directing appellees to submit proposed findings of fact, conclusions of law and judgment dismissing the complaint (R. 42-46). In this order, he expressed the view that the regulators supplied by appellees complied with the contract "as it must be here construed in the light of the ambiguities of form and content it bears" (R. 45). On December 16, 1954 findings of fact, conclusions of law, and judgment dismissing the complaint were entered (R. 46-54). The court found *inter alia* that (1) the contract did not require the delivery of genuine Delco-Remy regulators but instead permitted delivery of "or equals" and (2) appellees had not submitted to the Government for payment claims which were false, fictitious, or fraudulent (R. 50). In its conclusions of law, the court ruled *inter alia* that the October 16, 1950 letter of the Contracting Officer, advising that the balance of the regulators would be accepted on an "or equal" basis, prohibited the Government from demonstrating that, in fact, the regulators previously delivered were inferior (R. 53). This appeal followed.

SPECIFICATIONS OF ERROR RELIED UPON

1. The court below erred in holding that the contract between the United States and appellee permitted the delivery of other than genuine Delco-Remy regulators.

2. The finding of the court below that the regulators supplied by appellees as Delco-Remys met the specifications contained in the contract is clearly erroneous.

3. The finding of the court below that appellees did not submit for payment by the United States claims

known by them to be false and fraudulent is clearly erroneous.

4. The finding of the court below that the regulators supplied by appellees as Delco-Remys were not inferior in material respects to the genuine Delco-Remy regulator is clearly erroneous.

5. The court below erred in holding that the Contracting Officer's letter of October 16, 1950 was a written decision to the effect that the 4086 regulators here involved qualified as "or equals" and accorded with the specifications of the contract.

6. The court below erred in holding that the Contracting Officer's letter of October 16, 1950 was conclusive on the question as to whether the regulators supplied by appellees as Delco-Remys were inferior to the genuine Delco-Remy regulator.

7. The court below erred in excluding the Government's proof on the question as to whether the regulators supplied by appellees as Delco-Remys were inferior in construction and operation to the DR-1118502 Delco-Remy regulator specified in the contract.

8. The court below erred in ruling by implication that recovery of the statutory forfeiture provided in the False Claims Act is dependent upon a showing of ascertainable damage.

9. The court below erred in holding that the Government was not entitled to recover the statutory forfeiture on each of the seventeen claims in issue.

10. The court below erred in entering judgment dismissing the Government's complaint.

STATUTE INVOLVED

The relevant provisions of the False Claims Act are set forth in the Appendix, *infra,* pp. 37-39.

ARGUMENT

Introduction and Summary

The undisputed facts in the record reveal that, from the time of their receipt of the invitation to bid on the furnishings of regulators to the Army, appellees engaged in a course of conduct deliberately calculated to defraud the United States in the vital area of the procurement of war materiel. Apparently unmindful of the long established precept that "[m]en must turn square corners when they deal with the Government" [*Rock Island, Arkansas & Louisiana R. Co.* v. *United States,* 254 U.S. 141, 143], appellees expressly represented in their bid that they would furnish genuine Delco-Remy regulators, a representation which they sought to buttress by further representing that they were a dealer, not a manufacturer, of regulators. Despite these explicit representations they then themselves assembled regulators with non-Delco-Remy parts acquired from local concerns, and delivered them to the Government on invoices in which they certified that the regulators were genuine Delco-Remys. In an effort further to conceal this deception, appellees resorted to an ancient and recurring technique of the defrauder by placing a counterfeit Delco-Remy nameplate on each regulator, nameplates which, in turn, were obtained by appellees clandestinely. In reliance on appellees' certification and the nameplates, which the Government did not know were counterfeit, the Government accepted appellees' regulators as the Delco-Remys called for by the contract.

Notwithstanding appellees' complete and shocking disregard of basic and ordinary standards of honesty, the court below has ruled that their scheme to pass

off their regulators as Delco-Remys does not come within the purview of the False Claims Act. Underlying this ruling are two determinations: (1) that the contract authorized appellees to furnish other than genuine Delco-Remy regulators and (2) that the regulators furnished were in fact equivalent in construction and operation to the Delco-Remy regulator. These determinations themselves rest in large measure upon the meaning and effect accorded by the court to the Contracting Officer's letter of October 16, 1950.

As we show in Point I, *infra,* the court's conclusion that appellees were entitled to furnish "or equal" regulators has no foundation whatsoever in law or fact. To the contrary, appellees' bid, taken in conjunction with the invitation, leaves no room for doubt that the contract called for genuine Delco-Remy regulators and permitted no substitutions of any kind. That appellees were aware of this fact is amply evidenced by *inter alia* their acquisition and use of counterfeit Delco-Remy nameplates, an endeavor involving considerable risk which would have been totally unnecessary had the contract authorized the delivery of an "equal" and had the regulators supplied been in actuality equivalents of the Delco-Remy model. Moreover, the Contracting Officer's letter is devoid of anything to support the court's suggested reading of the contract. If anything, the letter reinforces the conclusion that appellees contractually agreed to supply regulators of Delco-Remy manufacture.

We further show in Point I that the United States was entitled to recover the forfeitures provided in the False Claims Act upon the demonstration that appellees deliberately palmed off their own regulators for the

Delco-Remys required by the contract, that the Army accepted them because it was deceived by false certifications and the counterfeit nameplates, and that appellees received payment because by their deception they had induced the Government into believing that the Delco-Remy had been delivered. It is not material that, in other circumstances, the contract might have been one for the furnishing of non-Delco-Remy regulators. Nor does it make a difference how appellees' regulators compared with the Delco-Remy. It is settled that the submission of a false claim to the Government gives rise to liability for the $2000 prescribed by the Act without proof of ascertainable actual damage flowing therefrom. The statutory amount represents liquidated damages for those losses sustained in connection with the false claims which, because of their nature, cannot be reduced to a monetary equivalent—as, for example, the expense incurred by the Government in ferreting out and investigating the fraud.

While it is not essential to prove actual damages, the Government nevertheless offered ample and uncontroverted evidence that appellees' regulators differed in several material respects from, and were inferior to, the Delco-Remy model which appellees represented them to be. We show in Point II, *infra,* that the District Court erred in rejecting this evidence. The Contracting Officer's letter, insofar as it related to the purported equality of appellees' regulators, was not a decision under the disputes clause of the contract entitled to finality by reason of *United States* v. *Wunderlich,* 342 U.S. 98. And, even if the letter were to be deemed within the scope of the *Wunderlich* doctrine, it did not have any bearing upon the acceptability of

the 4086 regulators here involved which were delivered prior to the letter.

I

Appellees Knowingly Submitted False and Fraudulent Claims to the Government for Payment and Are Liable for the Statutory Amounts Provided in the False Claims Act Irrespective of Whether Ascertainable Actual Damage Resulted Therefrom.

A. *The Contract in Terms Called for the Delivery of Delco-Remy Regulators*

At the foundation of the decision below that appellees had not presented false, fictitious or fraudulent claims to the Government for payment within the meaning of the False Claims Act is the court's determination that their contract with the United States permitted the delivery of "equal" regulators in lieu of genuine Delco-Remy regulators. As will be seen below, the regulators supplied were decidedly inferior; thus, even if this were a correct construction of the contract, appellees' cause would not be advanced. But the fact is that the court's holding is squarely contradicted by the express terms of the invitation to bid and appellees' responsive bid, which taken together constitute the contract. Additionally, assuming that there is occasion to go beyond the four corners of these documents, the record clearly reflects the understanding of both appellees and the Army that the contract required the furnishing of genuine Delco-Remy regulators.

1. The invitation submitted to appellees by the Army called for a bid on the furnishing of 6,600 "regulator[s], generator, Assy. Mfr's Part Nos. DR-1118502, GM-1118502, IHC-50301-R1 or equal." (SR. 295)

DR-1118502, GM-1118502 and IHC-50301-R1 being part numbers assigned to a regulator model then being manufactured by the Delco-Remy Division of General Motors, bidders were thus authorized *to submit bids* on either Delco-Remy regulators or equivalent regulators of a different manufacture.

At the same time, however, paragraph 2e of the "Special Conditions" attached to the invitation and made a part of the contract, advised bidders that if they intended to offer regulators other than Delco-Remys on an "or equal" basis, they should so indicate on the bid itself (SR. 292). It further advised that in the absence of such indication the bidder, if awarded the contract, *would be required to furnish the Delco-Remy model "without substitution of any kind"* [emphasis supplied] (SR 292). And paragraph 2d detailed the procedure to be followed by the bidder if he intended to furnish any other kind of regulator:

> A bidder offering a substitute item as an "or equal" must sustain the burden of providing information in sufficient detail to permit the determination by the Contracting Officer of the "or equal" status of any substitute item so offered by submitting, *with the bid,* all necessary specifications, drawings, bills of material and other pertinent supporting data necessary to permit the Contracting Officer to determine the acceptability of the tendered item of supply to the using service. If supplemental data is requested by the Contracting Officer and such data is not furnished by the bidder, as requested, no further consideration will be given to such bid. [emphasis appears in the original] (SR. 292).

In their bid, appellees failed to disclose that they did not intend to furnish Delco-Remy regulators; similarly, they omitted to submit "specifications, drawings, bills of material," or the other data required with respect to non-Delco-Remy regulators. While these actions would, under the terms of the invitation, be sufficient to require the delivery of Delco-Remy regulators, appellees did not leave to implication their understanding of the contract's requirements; just below the item description on page two of Schedule A of the invitation, they unequivocally stated that they were "Bidding DR-1118502" (SR. 295). And giving further color to this representation, in answer to questions on page one of Schedule A, they denied—falsely, as it now appears—that they manufactured regulators and asserted that they regularly carried a stock of them (SR. 294).

2. In view of the provisions of Special Conditions 2d and 2e, as well as appellees' express representations that they were "Bidding DR-1118502" (*i.e.*, offering to furnish regulators manufactured by Delco-Remy) and that they were not a manufacturer, it is difficult to see how appellees may now be heard to assert that the contract contemplated or permitted the substitution of a regulator of their own manufacture. The Government hardly could have cast into clearer terms than those of paragraph 2e the requirement that, absent an expressed intent in the bid to furnish a substitute item, the successful bidder would be held to the delivery of genuine Delco-Remy regulators. Moreover, while appellees in any event would be charged with constructive knowledge of the terms of the invitation on which they bid, the facts lead to the inevitable conclusion that they were fully aware that, in the circumstances, any regulator

other than Delco-Remys would not meet the contractual requirements.

First of all, there is the matter of the lengths to which appellees went in seeking to prevent the Government from discovering that the regulators were not in fact Delco-Remys. Besides the time and effort attendant to obtaining and affixing the counterfeit nameplates, appellees' devious actions in this connection subjected them to considerable risk. True enough, their employee Lang tried to keep the scheme under cover by first ordering the plates in the name of a fictitious "Thompson Distributing Company" and then once appellees received the plates, insisting that the purchase order—the sole evidence of the transaction—be returned (R. 185-187). But appellees could not have failed to recognize that, despite all such precautions, their unauthorized and improper use of the Delco-Remy name might come to light, leaving them open to the risk of having to pay heavy damages to General Motors for unfair competition and perhaps for trade-mark infringement as well. In view of this very real risk, it taxes the imagination to suppose that appellees would have turned to the use of these Delco-Remy nameplates, which they apparently thought could be obtained only in such an underhanded way, had they not deemed it essential to deceive the resident ordnance inspector into believing that the regulators were in fact Delco-Remys. Certainly no reasonable businessman in appellees' position would have gone to such lengths if he had any basis for believing that the contract did not call for Delco-Remy regulators and hence that the resident inspector would accept regulators of non-Delco-Remy manufacture as complying with the contract.

Further indication that appellees fully understood

the requirements of the contract, as clearly manifested by the invitation and bid, is to be found in the testimony of their sales manager Kornbacher. With refreshing candor he admitted that in a conversation with appellee Mezori, the general manager of all three concerns involved, the latter had revealed his intent to "deliver to the Army regulators assembled by him [and] *made to appear like the Delco-Remy model*" [emphasis supplied] (R. 169). Kornbacher then had suggested that Mezori inform the Army that "the original item we thought we were going to furnish * * * was not the item they desired" and ask it "to arrive at [a] decision in the matter" (R. 170). Mezori did not challenge the validity of this suggestion but, according to Kornbacher, nevertheless did not act upon it, *i.e.*, went ahead and furnished appellees' own regulators which had been made to appear as Delco-Remys without in any way advising the Army he was doing so (R. 170).

It is also highly significant that, in the certification accompanying each of the 17 invoices here involved, appellees on the one hand set forth *verbatim* that portion of the item description in the invitation referring to Delco-Remy regulators and on the other hand carefully refrained from use of the phrase "or equal".[5] Again, it

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[5] The item description in the invitation was as follows (SR. 295):

> Regulator, generator, Assy. Mfr's Part Nos. DR-1118502, GM-1118502, IHC-50301-R1, or equal. ORD-7069022, ORD-7069023. Ordnance Stock No. 2580-1118502. Vehicle Application SNL G541, G671, G506, G501, G508.

The description of the supplied item in the invoices submitted for payment by appellees read as follows (R. 103):

> Regulator, generator, Assy. Mfr's Part Nos. DR-1118502, GM-1118502, IHC-50301-R1, ORD-7069022, ORD-7069023. Ordnance Stock No. 2580-1118502. Vehicle Application SNL G541, G671, G506, G501, G508.

is more than a fair inference that appellees adopted this consistent practice because they recognized that the Army would reject the shipment if it knew that the regulators were not Delco-Remys. At least, we have been unable to imagine any other possible reason and to date appellees have not suggested any.

Finally, and perhaps most revealing, is the testimony of Mezori himself. On cross examination, he conceded that he understood the contract called for the same item as he had delivered to the Government under a previous contract (R. 269). When asked whether the items shipped under that contract "[w]ere * * * regulators assembled by [him], or surplus regulators made by Delco-Remy," Mezori reluctantly admitted (R. 270):

> Regulators made by Delco-Remy, I believe.

3. The court below, totally ignoring these considerations, took the position that the Contracting Officer had "decided" that appellees' regulators "complied in all respects with the contract" and that this "decision" was to be afforded conclusive effect (R. 53). In this connection, the court placed reliance on his October 16, 1950 letter (R. 53). We submit, however, that the letter, both when taken alone and when read in context, is not susceptible of any such interpretation.

At the outset, it is important to bear in mind the occasion for the Contracting Officer's writing to appellees. Approximately one month before, on September 14, 1950, it had been called to his attention that the 4,086 regulators already delivered by appellees as Delco-Remys were not Delco-Remys despite their nameplates and that in reality they had been manufactured and assembled by appellees and their subcontractors

(R. 116). Upon learning this, the Contracting Officer had forthwith instructed the inspector not to accept any more regulators from appellees pending the conclusion of tests to determine how they compared with the Delco-Remy model (R. 117). This action left open the question as to whether the balance of appellees' regulators would be accepted by the Army. It was solely to this question that the Contracting Officer needed to, and did in fact, address himself when he wrote to appellees.

After a recitation of (1) the developments leading up to the contract, including appellees' offer in terms to furnish the Delco-Remy model and (2) the Army's discovery of the actual origin of the 4,086 regulators delivered, the Contracting Officer proceeded in his October 16 letter to consider whether in furnishing their own regulators appellees had complied with the contract as written. And, contrary to the belief of the court below, his conclusion was categorically in the negative (R. 117):

> [In connection with the question of conformity with the requirements of the contract] your attention is directed to the fact that *in your bid you offered to furnish one of the approved items listed in the Invitation,* and that on page 1 of Schedule "A" of your bid you indicated by appropriate underscoring (a) that you were *not* a manufacturer of the articles quoted on and (b) that you *do* regularly carry a stock of such articles. This was construed to mean that you regularly carry a stock of genuine Delco-Remy Regulators, and since the Regulators tendered for acceptance bore a Delco-Remy name place, *it was assumed that they*

> *were the approved items upon which you bid.* Also, the "SPECIAL CONDITIONS" which constitute a part of your bid established a procedure for qualifying "or equal" items, which had not been followed, *thereby entitling the Government to cancel the contract for default pursuant to the provisions of the contract, should it elect to do so.* (Emphasis supplied).

Having thus explicitly pointed out that the contract called for Delco-Remy regulators, the Contracting Officer then turned to the matter as to whether the balance of the regulators would nevertheless be accepted. No doubt influenced by the report to the effect that the regulator tested was equivalent to the Delco-Remy model, as well as by the outbreak of the Korean war and the consequential demand for military supplies of all kinds, the Contracting Officer advised appellees that the resident ordnance inspector had been instructed to take the remaining regulators on an "or equal" basis (R. 117).

The October 16 letter therefore constituted nothing more or less than a decision by the Contracting Officer that the contractual requirement that Delco-Remy regulators be furnished would be waived insofar as future deliveries were concerned. The Contracting Officer's authority to take such action being undisputed, the Government has never raised any question respecting appellees' post-October 16 delivery of non-Delco-Remy regulators or their claims for payment based thereon. The instant action is limited to the 4,086 regulators furnished prior to September 14, 1950, the date upon which appellees' deception came to light. We emphasize again that the Contracting Officer did not, and in the circum-

stances could not, decide that these items, falsely certified to be Delco-Remys, complied with the contract. And neither he nor anyone else purported at any time to waive the contractual specifications as to them.[6]

B. *By Assembling Their Own Regulators For Delivery Under The Contract, Affixing Counterfeit Delco-Remy Nameplates To Them, And Representing To The Government That They Were Of Delco-Remy Manufacture, Appellees Became Liable For The Statutory Damages Provided In The False Claims Act.*

In view of the foregoing, the situation in the final analysis comes down to this. Appellees contracted with the United States to furnish Delco-Remy regulators. Instead of endeavoring to comply with the contract, they assembled their own regulators, which differed in at least two material respects from the Delco-Remy, and delivered them to the Government. To conceal the substitution, a counterfeit of the Delco-Remy nameplate was surreptitiously obtained and attached to each regulator. And in each of the seventeen invoices, appellee described the item being supplied as a Delco-Remy regulator and certified that "all conditions of purchase have been complied with."

These considerations by themselves render appellees

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[6] Although neither appellees nor the court below placed reliance on the fact that the resident ordnance inspector certified on the invoices that the regulators "have been accepted as conforming to contract requirement," we note in passing that any such reliance would be totally misplaced. Leaving aside the question as to whether the ordnance inspector had the authority to bind the Government on matters of contract interpretation, his certification, as the record shows, stemmed from his belief, formed on the basis of the nameplates, that the items offered were Delco-Remy regulators (R. 200).

liable, at the very least, for $2,000 on each invoice, as prescribed by the False Claims Act. Appellees can draw no comfort from the possibility that the contract in other circumstances might have been written to permit the delivery of regulators assembled by appellees themselves. Nor does the recovery of the statutory damages depend upon a showing by the Government that the supplied regulators were inferior to the Delco-Remy model they were purported to be.

1. In determining whether the invoices presented for payment were false, fictitious, or fraudulent, the single relevant consideration is that discussed above, namely whether the items delivered were those the contract specified were to be supplied and those represented by appellees to have been supplied. That it is of no consequence that, had appellees followed the procedure outlined in the invitation, the contract conceivably could have been entered into on the basis of the delivery of an "or equal" regulator is seen from the holding of the Fifth Circuit in a closely parallel case. *Faulk* v. *United States,* 198 F. 2d 169 (C.A. 5).

There, the defendant had contracted with the United States to supply "milk, *fresh*" in accordance with "Federal Specification No. C-M-381c, Type II, No. 2." In carrying out the contract, however, he supplied recombined milk instead; endeavoring to conceal this fact from the Government by [198 F. 2d at 173]:

> * * * mislabeling the milk bottles so as to show that they contained "Grade A" milk when in fact he knew they contained "recombined milk", placing a few bottles of fresh milk in the rear of his delivery truck each day in order to deceive the Army veterinarian officer whose duty it was to

> inspect the milk before consumption by the troops; preparing the recombined milk at night in order to deceive an inspector for the Air Force sent to the plant for inspection purposes, threatening some of his employees with physical violence if they exposed him, and finally delivering the recombined milk rather than the fresh milk called for by the contract and certifying in his claims that delivery was in accordance with specifications. * * *.

In its answer to the Government's complaint brought under the False Claims Act, the defendant set forth, by way of an affirmative defense, a Note to the above specification to the effect that Type II, No. 2, pasteurized milk referred to "the first quality pasteurized milk, other than certified, available in communities not formally operating under the United States Public Health Service Milk Ordnance and Code." His argument was that since the milk delivered came within this description it met federal specifications, with the result that the claims presented for payment were not "false, fictitious or fraudulent" within the meaning of the False Claims Act. It was also noted that, at an earlier date, the defendant had supplied recombined milk to the Government under a different contract.

The district court rejected this contention and entered judgment for the United States in the amount of $2,000 for each of the five vouchers submitted for payment, plus double the amount of damages sustained by the Government. The court of appeals affirmed. Noting that the contract as written had been for the delivery of fresh milk, and that the defendant had certified that he had delivered fresh milk, the court held that in the circumstances it was entirely irrelevant that

the federal specifications mentioned in the contract may have also encompassed the recombined milk which had been in fact supplied [198 F. 2d 172].

The sound basis for this rule needs little elaboration. It is, of course, for the purchaser to decide what will serve his particular purposes and, when a contract is entered into calling for a particular item, he has the right to expect that the supplier will not later make an *ex parte* determination that a different item will do just as well. Further, and more important, the supplier who takes it upon himself to decide that the purchaser will be (or should be) satisfied by something other than that which had been agreed upon assuredly has no license to conceal the resultant breach of contract by deceiving the purchaser into believing that the contract item was being supplied. The short of the matter is that, no matter what the comparative merits of fresh and recombined milk and no matter what he had supplied under earlier contracts, the dairyman in the *Faulk* case, like appellees here, deliberately misrepresented a material fact when he placed false labels on the milk he furnished and then certified that the milk was fresh. And since in both instances the Government acted, as it was intended to, in reliance on the misrepresentation (by accepting the tendered items) the essential elements of fraud were present. See *Pence* v. *United States,* 316 U.S. 332, 338 and cases therein cited; cf. *United States ex rel Brensilber* v. *Bausch & Lomb Optical Co.,* 131 F. 2d 545 (C.A. 2), affirmed by an equally divided Court, 320 U.S. 711.

2. The Government's evidence below revealed that appellees' regulators offered as Delco-Remys not only differed from but were inferior to the Delco-Remy

model. The District Court first rejected this evidence altogether but later decided that it was admissible on the question of whether a false or fraudulent claim had been presented but not admissible on the question of inferiority (R. 249). The court then concluded that the Government had not been damaged by appellees' actions (R. 53).

We show in a subsequent part of the brief (pp. 31-35, *infra*) that the court below was in error in its view that the Government was foreclosed from proving the inferiority of appellees' regulators. But the plain fact is that, even had the Government made no endeavor at all to prove that the fraud had occasioned ascertainable damage, appellees would be liable for the statutory forfeitures. Whether and to what extent the United States is demonstrably damaged by reason of a false, fictitious or fraudulent claim is relevant only in respect to the other relief provided in the False Claims Act, namely the recovery of double damages.

This, we submit is clear from the pertinent terms of 31 U.S.C. 231, *infra:*

> *Any person* * * * *who shall make* * * * or present * * * for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, *any claim upon or against the Government of the United States,* or any department or officer thereof, *knowing such claim to be false, fictitious, or fraudulent,* or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, * * * any false * * * voucher, * * * claim, certificate, * * * knowing the same to contain any fraudulent or fictitious statement or entry, * * * *shall forfeit and pay*

> *to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained* by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit. [Emphasis supplied]

Assuming, however, that there could have been at any time serious doubt that the recovery of the forfeiture does not depend on proof of actual damages, it was totally dispelled by the Supreme Court's decision in *United States ex rel Marcus* v. *Hess,* 317 U.S. 537 and the subsequent holding of the Third Circuit in *United States* v. *Rohleder,* 157 F. 2d 126.

In the *Hess* case, the contention was that the defendants had conspired to rig the bidding on the furnishing of electrical work on PWA projects, despite their certifications that the bidding had been competitive. After a jury verdict in favor of the plaintiff, the defendants moved for judgment n.o.v. or, in the alternative, a new trial. One of the grounds advanced in the motion was that the court had erred in failing to charge that "[t]here can be no recovery of any penalty or foreiture on account of any project in which no actual damages have been shown" (41 F. Supp. 197, 218). The district court rejected this contention, observing that 31 U.S.C. 231

> expressly provides for a penalty of $2,000, "and, in addition, double the amount of damages which the United States may have sustained." This makes it plain that regardless of damages sustained, the United States would still be entitled to recover the penalty." [*Ibid*]

The judgment of the district court was reversed by the court of appeals on different grounds (127 F. 2d 233). In the Supreme Court, defendants renewed their contention respecting damages[7] and the Supreme Court, in reversing the court of appeals and reinstating the district court judgment, rejected it summarily (317 U.S. at 552-553): "We have examined the other contentions of the [defendants] and approve of the disposition of them by the courts below." Defendants thereafter filed a petition for rehearing again urging, *inter alia,* that as to certain of the contracts involved no ascertainable damages were shown to have been suffered by the Government.[8] Rehearing was denied, 318 U.S. 799.

The *Rohleder* case, *supra,* like *Marcus* v. *Hess,* involved the submission of non-competitive bids to the Government. The United States, seeking to recover the statutory forfeitures, offered no evidence of actual damages and the district court found as a fact that there had been no showing that the Government would have benefited financially had the bids submitted been genuine. The court nevertheless granted recovery of the statutory damages.

On appeal, the defendant asserted as its primary ground for reversal the failure of the Government to allege or prove actual damages. After a detailed review of the proceedings in *Marcus* v. *Hess,* the court of appeals rejected this assertion [157 F. 2d at 129]:

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[7] See Brief for Respondents in No. 173, October Term, 1942, *United States ex rel Marcus* v. *Hess,* pp. 103 et seq. Contended respondents: [p. 109] "If no damages have been proved, the judgment of the Circuit Court of Appeals should be affirmed."

[8] See Respondents' Petition for Rehearing in No. 173, October Term, 1942, *United States ex rel Marcus* v. *Hess,* pp. 3 *et seq.*

> In view of the attitude toward just such claims as are before us, by the Supreme Court in the Hess litigation, we conclude that [31 U. S. C. 231] permits recovery of a forfeiture thereunder without actual damage being proven.

While the matter may have little importance here, we think it should be noted that this does not lend support to the view of the court below, advanced in another connection, that the False Claims Act is "drastically penal" (R. 43). In *Marcus* v. *Hess, supra,* the Supreme Court was confronted with this precise contention and squarely held that the $2,000 plus double damage provision of the Act was remedial and not penal. The Court referred to its earlier decision in *Helvering* v. *Mitchell,* 303 U. S. 391, where, in holding that the additional assessment of 50% imposed in the case of tax fraud was compensatory in nature, it had observed that [303 U. S. at 401]:

> The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud.

See also *United States* v. *Grannis,* 172 F. 2d 507 (C. A. 4). Cf. *Stockwell* v. *United States,* 13 Wall. 531, 547, 551.

What the statutory provision thus represents is liquidated damages for those losses sustained by the Government in connection with the particular fraud which are not readily susceptible of reduction to a monetary

equivalent and as to which the risk of uncertainty long has been regarded as on the wrongdoer. *Armory* v. *Delamine,* 1 Strange 506, 93 Eng. Rep. 664 (1722); *Bigelow* v. *RKO Radio Pictures,* 327 U. S. 251, 265. In the instant case, this would include the doubtless heavy, though difficult to measure, expenses incurred in ferreting out appellees' fraudulent use of the Delco-Remy nameplate.[9]

II

Assuming Recovery Of The Statutory Damages Is Dependent Upon A Showing That The Supplied Regulators Compared Unfavorably With The Genuine Delco-Remy, Such Showing Was Made Below And The District Court Erred In Rejecting It.

Even were this Court to hold, contrary to *Marcus* v. *Hess, supra,* that recovery of the $2,000 statutory damages for each false and fraudulent certificate depended upon a showing that the regulators delivered were inferior to the Delco-Remys they were represented to be, the judgment below still must be reversed. The Government made an abundant showing, by competent evidence, that the supplied regulators compared unfavorably with the Delco-Remy in at least two important respects. And the refusal of the District Court to consider this evidence was based upon its misconception

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[9] While in *United States ex rel Brensilber* v. *Bausch & Lomb Optical Co.*, 131 F. 2d 545 (C.A. 2), affirmed by an equally divided Court, 320 U.S. 711, the Second Circuit stated that the False Claims Act is penal in nature, the actual holding in that case was that the possession of an unlawful monopoly of the market was not a "fraud" since the defendant had never expressly or impliedly represented to the contrary. This determination, affirmed by the Supreme Court, did not turn upon the False Claims Act being a penal statute. Further, the opinion of the Second Circuit was rendered prior to the Supreme Court's decision in *Marcus* v. *Hess.*

of the scope and effect of the Contracting Officer's letter of October 16, 1950.

1. The testimony of the Government's witnesses showed that appellees' regulators contained a hinge in their armature assembly which was made of steel or bronze (R. 143). In its regulators, however, Delco-Remy used a hinge made of bimetal (R. 223). The bimetal served to keep the voltage of the unit constant under all conditions; the voltage varies in regulators with non-bimetal hinges as much as 20% when the unit becomes heated through operation (R. 227). And, if the regulator does not maintain constant voltage, the battery of the vehicle will run down (R. 228). This in turn will result in the radio, lights and/or blower motors burning out (R. 227-229).

It was further shown that the insulating plates on appellees' regulators were made of a paper-based phenolic substance (R. 158-163). In its No. 1118502 regulator, designed for heavy military duty, Delco-Remy used linen-based insulation (R. 230-233). Although linen-based plates do not have superior insulating properties, they have much greater durability and will therefore stand much more abuse (R. 231).

2. Appellees, conceding their use of non-bimetal hinges and paper-based insulation (R. 238, 239), did not directly challenge the expert testimony that Delco-Remy used other and superior materials in its DR-1118502 regulator. Instead, they rested exclusively upon the test report that the supplied product and the genuine Delco-Remy "have similar characteristics and are interchangeable" and that a visual inspection revealed "no difference in construction, materials used, or methods of adjustment"; and the Contracting Officer's resulting acceptance of the balance of the regu-

lators. Reduced to essentials, appellees' argument, accepted by the District Court, was that no matter how erroneous or incomplete [10] the test report may have been, the action taken by the Contracting Officer closed the door permanently and for all purposes to a demonstration that the 4,086 regulators in issue were inferior. In this connection, reliance was placed primarily on Article 14 of the contract.

Article 14 is the familiar "disputes clause" found in standard form Government contracts. It provides in material part that "all disputes concerning questions of fact which may arise under this contract" and which "are not disposed of by mutual agreement" are to be decided by the Contracting Officer, with a right of appeal by the contractor to the Department head (SR. 287). The latter's decision, or that if his designated representative, is to be final and conclusive (SR. 287).

Clauses such as Article 14 concededly attach finality to the Departmental determination of factual disputes, unless the determination "was founded on fraud, alleged and proved." *United States* v. *Wunderlich,* 342 U. S. 98, 100; *United States* v. *Moorman,* 338 U. S. 457; *United States* v. *Callahan Walker Constr. Co.,* 317 U. S. 56, 58; *United States* v. *McShain, Inc.,* 308 U. S. 512, 520; *Plumley* v. *United States,* 226 U. S. 545; *Sweeney* v. *United States,* 109 U. S. 618, 620; *Kihlberg* v. *United States,* 97 U. S. 398, 402. But in hold-

[10] It should be observed that the test report on the basis of which the Contracting Officer acted (R. 124-125) does not reflect that the tested regulator was stripped down and each part examined. In the absence of such a procedure, the fact that the regulator had paper-based insulation plates would not be discovered. The operational test of course would not reveal the composition of the plates.

ing that the Contracting Officer's letter came within the ambit of Article 14, the District Court plainly ignored the fact that the operation of the finality provision in the Article in terms is limited to decisions resolving *disputes* of fact.

A dispute exists only where something asserted on one side is denied by the other. *Keith* v. *Levi,* 2 Fed. 743, 745 (C. C. W. D. Mo.); *In re Robinette,* 211 Minn. 223, 200 N. W. 798; *Black's Law Dictionary* (3rd Ed., 1933) p. 593. There can be a dispute only where there is controversy, disagreement, opposing contentions or argument to persuade the other side to change its position. *Miners' General Group* v. *Hix,* 123 W. Va. 637, 643-644, 17 S. E. 2d 810, 814; *Block Coal & Coke Co.* v. *United Mine Workers,* 177 Tenn. 247, 148 S. W. 2nd 364.

Wherein lay the controversy or disagreement preceding the Contracting Officer's October 16 letter? What were the opposing contentions on the part of appellees and the Government that were to be weighed by the Contracting Officer? When, prior to October 16, did appellees assert that their regulator was equal to the Delco-Remy? When did Ordnance assert to the contrary? In short, was the Contracting Officer called upon to resolve a *dispute* as to the equality of the two regulators and, if so, when and how did it arise?

We have earlier reviewed, in another connection, the setting of the October 16 letter. See pp. 19-21, *supra.* It was there noted that the Contracting Officer's action was not in response to conflicting assertions respecting the equivalence of the Delco-Remy and the 4,086 regulators previously delivered by appellees under the contract. Indeed, appellee hardly would have been in

a position to make any assertion at all in this regard in view of the fact that they had, in the first instance, certified that their regulators were genuine Delco-Remys and the Army had accepted them and paid for them on that basis.

What prompted the Contracting Officer's letter instead was the necessity of making a determination as to (1) whether the contract permitted the delivery of anything other than genuine Delco-Remys and (2) if not, whether the balance of the regulators appellees proposed to supply nevertheless would be accepted on an "or equal" basis. Respecting the first question, there was a dispute and it was unequivocally resolved against appellees. See *supra,* pp. 20-21. Insofar as the second question is concerned, however, there was, and could have been, no dispute. In the first place, the record does not indicate that any Army official or employee expressed any opinion at all on the quality of appellees' regulator prior to the Contracting Officer's receipt of the test report. Secondly, appellees were not entitled to be heard on the question whether the Government would accept further performance not in compliance with contractual specifications. The contract calling for genuine Delco-Remys "without substitution of any kind," it was for the Government to decide unilaterally whether appellees' locally assembled regulators sufficiently approximated the Delco-Remy to warrant a waiver of the contract as to the remaining regulators. It is obvious, of course, that there can be no dispute between parties to a contract over a matter in which one of them has no voice.

Thus the Contracting Officer plainly was not acting under Article 14 when he decided to accept further shipments of appellees' nonconforming regulators on

an "or equal" basis. While this, we submit, is fully dispositive of the finality question, there are still other and independent reasons why the letter did not foreclose the showing of inferiority made by the Government below.

For one thing, this showing, it is to be stressed again, was made in connection with the 4086 regulators already delivered to and accepted and paid for by the Army as being of Delco-Remy manufacture. Even had there been a dispute as to their quality, within the meaning of Article 14, the Contracting Officer did not purport to resolve it. As we have seen, his concern was simply with the quality of the remaining regulators, which as of that time were still undelivered and unpaid for.

Additionally, unlike *Wunderlich* and the earlier cases construing the disputes clause, this action was not brought on the contract and does not pertain to monies under the contract. This is instead an action for fraud, growing out of the deliberate misrepresentations by appellees regarding the origin and composition of the items delivered. There is nothing in the *Wunderlich* line of cases to indicate that Article 14 is applicable in suits of this character. And, it being settled that no Government official may dispense with the requirements of law or relinquish rights of the United States without clear warrant from Congress,[11] no action taken by the Contracting Officer can have the effect of waiving the right bestowed upon the United States by the False Claims Act to recover damages for fraud.[12]

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[11] See *e.g.*, *Hart* v. *United States*, 95 U.S. 316, 318; *Munro* v. *United States*, 303 U.S. 36, 41; *Case* v. *Terrell*, 11 Wall 199, 203.

[12] The court below also made reference to 41 U.S.C. 1-260 (R. 53). But while the contract was entered into pursuant to the Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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151-161 (SR. 286), we see nothing therein that possibly could be read as precluding the Government from demonstrating the inferiority of appellees' regulators.

APPENDIX

The relevant provisions of the False Claims Act, revised statutes 3490-3492, 5438, 31 U. S. C. 231-233 are as follows:

[31 U. S. C. 231]

Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody or control of any money or other public property used or to be used in the military or naval service, who with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of

such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

[31 U. S. C. 232]

(A) The several district courts of the United States, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

* * * * *

[31 U. S. C. 233]

It shall be the duty of the several United States attorneys for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section 231 of this title by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of $2,000, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

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